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Supreme Court of the United States

OCTOBER TERM, 1954

No. 764

EVEREST MELVIN HUPMAN, a/k/a
MELVIN E. HUPMAN,

Petitioner,

against

THE UNITED STATES.

PETITIONER'S REPLY BRIEF

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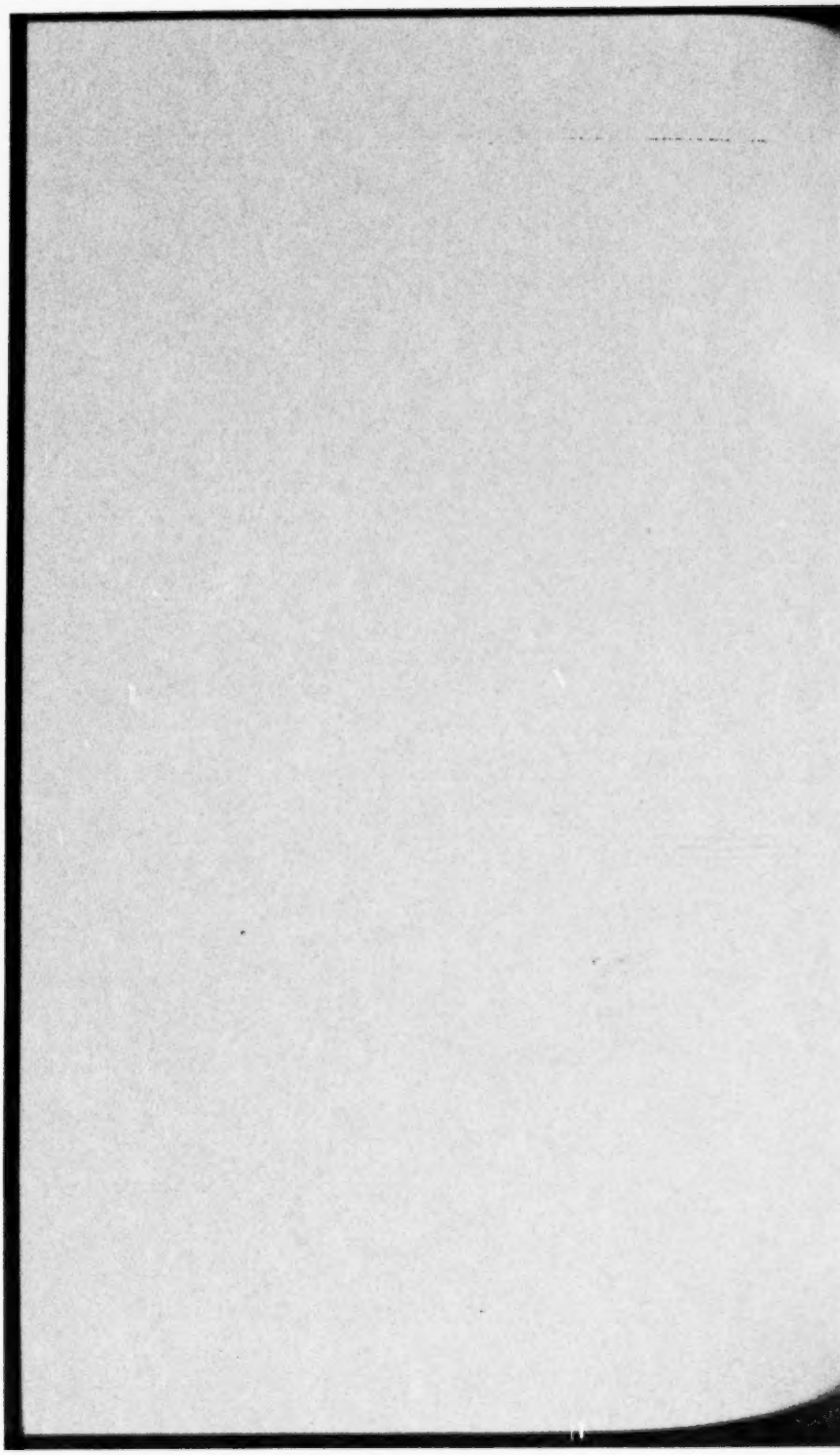

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TABLE OF CASES CITED

American Communications Association v. Douds, 339 U. S. 382 5

Caldwell v. United States, 205 F. 2d 879 (App. D. C.) 3

Coplon v. United States, 191 F. 2d 749 (App. D. C.), cert. den. 342 U. S. 926 3

Glasser v. United States, 315 U. S. 60 4

Gouled v. United States, 255 U. S. 296 3

Nardone v. United States, 302 U. S. 379 3

United States v. Silverman, Crim. No. 8991, D. C. Conn., February 23, 1955 4

Walker v. United States, 93 F. 2d 383 (C. A. 8), cert. den. 303 U. S. 644 4

STATUTES CITED

Labor-Management Relations Act of 1947, Section 9 (h) 1, 5

United States Constitution:

Fourth Amendment 3

Fifth Amendment 3

Sixth Amendment 3

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The present petition raises questions of novel impression, involving for the first time the application of Section 9(h) of the Labor-Management Relations Act of 1947. This is not seriously contested by the government in its brief in opposition. Nor does it controvert the facts upon which the substantial questions raised herein relating to the administration of justice are founded. Petitioner does not intend to reargue in this reply brief the points discussed in his petition, but deems it necessary to clarify certain of the issues posed.

1. The government for the first time concedes in its brief in opposition that the filing of the affidavit by the petitioner is an essential element of the offense, stating:

> " * * * the filing of a false affidavit with the National Labor Relations Board is necessary to constitute the crime under 18 U. S. C. 1001 with which petitioner was charged * * * " (G. Br. 11-12).

If this is so, the government has confessed error as this essential ingredient of the offense is not alleged in the indictment in *haec verba* or otherwise.

The government at this late date seeks to remove itself from the horns of the dilemma by in effect rewriting the indictment, and on page 5 of its brief in opposition states:

> "Both counts charge that petitioner made false statements to a government agency, the National Labor Relations Board, in an 'Affidavit of Non-Communist Union Officer' which he filed with that agency on January 5th, 1950 * * *."

But, in fact, the indictment (R. 18-19) does not charge that petitioner (1) made a false statement to a government agency or (2) filed or caused the affidavit to be filed. Nor does the indictment refer to the purported date of filing, i.e., January 5, 1950, but rather to the purported date of signing, i.e., December 15, 1949.[1]

In light of these deficiencies, the petition for writ of certiorari should be granted and the judgment of conviction should be reversed forthwith and the indictment dismissed.[2]

2. The government does not dispute the fact that the paid informer Dunham obtained evidence against petitioner through an illegal search and seizure. Nor does it deny that Dunham while in the pay of the government sought and obtained information from petitioner relating to the

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[1] The indictment similarly failed to allege that petitioner was an officer of the union or a member thereof. The record was devoid of any evidence of petitioner's membership in the union. The prosecution relied solely upon Govt. Ex. 1 in attempting to prove officership (see Pet. 35-37).

[2] No strained and belated interpretation of the evidence may substantiate a claim that sufficient proof was offered to sustain this element of the offense. The issue was never litigated in the trial court, the government did not in fact prosecute the case on the theory that filing was an essential element of the offense, nor did the court so charge the jury.

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preparation and defense for the trial below. The prosecution does not defend these invasions upon petitioner's constitutional rights upon either moral or legal grounds. There was beyond dispute a fraud participated in by the government, perpetrated upon petitioner as a means of obtaining evidence in violation of the Fourth, Fifth and Sixth Amendments to the United States Constitution. The prosecution seeks to excuse its action on the grounds that there is no proof that the evidence so obtained was used in the course of the trial or that it served as a link in the chain of evidence in the case.

But the prosecution, with the approval of the trial court, placed a cloak of secrecy about the illegal acts and refused to disclose the fruits of the unlawful invasion of constitutional rights. Therefore one cannot now justify the conviction on the grounds that the record does not reveal the extent of the information obtained.[3]

Unfortunately, such intrusions upon the attorney-client relationship, see *Coplon* v. *United States*, 191 F. 2d 749 (App. D. C.), cert. den. 342 U. S. 926; *Caldwell* v. *United States*, 205 F. 2d 879 (App. D. C.), and instances of illegally obtained evidence through fraudulent means, see *Gouled* v. *United States*, 255 U. S. 296, are today neither rare nor unusual phenomena. The widespread use of informers and the license of any and all means to guarantee a conviction constitute such an infringement of constitutional rights and denial of due process as to require this Court to exercise its supervisory powers.

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[3] Petitioner was precluded from inquiring into the fruits of the illegal search and seizure and invasion of the attorney-client relationship. His request for production of the informer's reports to the government on his illegal search was denied (R. 343-347), as was his motion to strike the illegally-obtained evidence (R. 637). Although the proper foundation was laid, petitioner's persistent attempts to obtain notes and memoranda submitted to the government by the informers were denied (R. 572, 578, 582). Petitioner also vainly sought a hearing and examination on the nature and scope of the information obtained relating to the preparation for trial (R. 574), see *Nardone* v. *United States*, 302 U. S. 379.

3. The prosecution, in seeking to maintain the validity of the indicting grand jury herein, misconceives the import of petitioner's argument. The objection to the procedure is not solely the source of the names [4] but primarily that the federal jury officials, required by statute to constitute the list, exercised no power of selection, judgment or evaluation either prior or subsequent to the submission of names and abandoned their responsibilities in toto to persons unknown. It is not just that "there was the misfeasance of such delegation, but rather the nonfeasance of failing to perform an essential part of [the federal jury officials'] duty." *United States* v. *Silverman*, Crim. No. 8991, D. C. Conn., February 23, 1955.

The government's sole authority to sustain the action of the trial court, *Walker* v. *United States*, 93 F. 2d 383 (C. A. 8), cert. denied 303 U. S. 644, was clearly rejected by this Court in *Glasser* v. *United States*, 315 U. S. 60.[5]

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[4] The Government implies in its Brief in Opposition (G. Br. 18) that the names were obtained from "prominent citizens." In fact, as evidenced by the supporting affidavits and the offer of proof (R. 51-90), the jury officials were not acquainted with the sources of the names which composed the jury list from which the indicting grand jury was drawn.

[5] In that case the government in its brief to this Court cited *Walker* v. *United States*, *supra*, in seeking to sustain actions similar to the ones complained of herein. This Court rejected the *Walker* rationale and stated:

> "Jurors in a federal court are to have the qualifications of those in the highest court of the state and they are to be selected by the clerk of the court and a jury commissioner. * * * This duty of selection may not be delegated. United States v. Murphy, D. C., 224 Fed. 554; In re Petition for Special Grand Jury, D. C., 50 F. 2d 973."
>
> *Glasser* v. *United States*, *supra*, at p. 85.

Further, the *Walker* decision was prior to the enactment of 28 U. S. C. 1861 et seq. and the qualifications of the jurors were then determined *solely* by the law of the state in which the district was located. This has since been changed. Letters were sent out by the jury commissioner in that case calling for compliance with the minimum qualifications of jurors as provided by state law.

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4. This Court in *American Communications Association* v. *Douds*, 339 U. S. 382, sustained Section 9(h) of the Labor-Management Relations Act of 1947 upon the ground that it permitted a union officer who may have been a member of the Communist Party to shed his affiliation and thereby lawfully sign a non-Communist affidavit. It was only upon such an interpretation that the statute was sustained in the face of the charge that the political oath set forth in Section 9(h) constituted a bill of attainder. Hence, the crucial burden of the government was to prove that petitioner was a member of the Communist Party on the date he signed the affidavit, to wit, December 15, 1949. Further, this Court required direct proof of membership by overt acts at the time in issue. The prosecution in its brief in opposition seeks to gloss over the deficiencies of its evidence in these respects by avoiding them completely. Flowing from this disregard of the constitutional requirements is a certain lack of preciseness in the government's statement of the case [6] and a failure to match the proof adduced with the criteria enunciated by this Court in *American Communications Association* v. *Douds*, *supra*. These constitutional requirements will only have meaning if cases such as this, admittedly impinging on First Amendment rights, are in all their aspects severely scrutinized by this Court.

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[6] For example, the government's claim that petitioner's name was found on a Communist membership list in the year 1949 or subsequently is not supported by the record (G. Br. 9, but see R. 424, 427-428). Likewise, the government in its allusion to a "Taft-Hartley group" in 1950 (G. Br. 10) fails to reflect the record which shows that the purported group did not come into existence until the end of 1950, about a year after the date in issue (R. 448-449, 531).

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of conviction reversed.

Respectfully submitted,

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